No. 77-1419

In the Supreme Court of the United States

OCTOBER TERM, 1977

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

SOCIALIST WORKERS PARTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Solicitor General,
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Assistant Attorney General,
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CITATIONS

258-736—78

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The Solicitor General, on behalf of the Attorney General, the United States of America, the President of the United States, the Director of the Federal Bureau of Investigation, and the other defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

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[1] The other defendants named in the amended complaint include the Secretary of the Treasury, the Secretary of Defense, the Director of Central Intelligence, the Director of the Secret Service, the Director of the Defense Intelligence Agency, the Postmaster General, the Secretary of the Army, the Commissioners of the Civil Service Commission, and "unknown agents of the United States Government."

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–11A) is reported at 565 F. 2d 19. A prior opinion of the court of appeals (App. B, *infra*, pp. 12A–21A) is reported at 510 F. 2d 253. The district court did not render an opinion concerning the present issues; a prior opinion of the district court (App. E, *infra*, pp. 24A–38A) is reported at 387 F. Supp. 747.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 22A) was entered on October 11, 1977. A timely petition for rehearing was denied on March 9, 1978 (App. D, *infra*, p. 23A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Attorney General must submit to a citation for contempt of court in order to obtain appellate review of a district court's order that he reveal presumptively privileged documents to an adversary in litigation.

STATUTES INVOLVED

1. 28 U.S.C. 1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.

2. 28 U.S.C. 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

1. "This action was commenced in 1973 by the Socialist Workers Party (SWP), the Young Socialist Alliance (YSA) and several individual members of those organizations. Their second amended complaint, which seeks both injunctive relief and some $40 million dollars [*sic*] in compensatory and punitive damages from the United States and various officials and employees, recites a litany of alleged wrongful acts on the part of [petitioners] beginning in 1938, including blacklisting, harassment, disruption, wiretapping, mail tampering, breaking and entering, and assault" (App. A, *infra*, pp. 1A–2A). The case has not gone to trial, and the principal disputes to date have concerned the status and identity of informants who have given information to the Federal Bureau of Investigation concerning the respondents.

The district court initially enjoined all informants from attending a meeting of YSA (App. E, *infra*, pp. 24A–38A). The court of appeals reversed that decision (App. B, *infra*, pp. 12A–21A), concluding that the use of informants does not violate any constitutional right of respondents and that the injunction posed the threat of "serious prejudice to the Government from compromising some or all the informants for all time, even though the final determination of the action may be for [petitioners]" (*id.* at 20A). Mr.

Justice Marshall denied an application for a stay, explaining that "the Court of Appeals has analyzed the competing interests at some length, and its analysis seems to me to compel denial of relief." 419 U.S. 1314, 1319.

In the district court, respondents "have had broad discovery by way of interrogatories, depositions and production of documents" (App. A, *infra,* p. 2A). "Approximately seventy thousand documents have been turned over to [respondents] by governmental agencies" (*id.* at 2A n. 1). Respondents have sought, in addition to the materials they already have received, the names of all the persons who on more than one occasion have provided information to the Federal Bureau of Investigation concerning respondents' activities. There are more than 1,300 such persons, and we argued in the district court that "the government's ability to gather information for general law enforcement purposes would be severely damaged by disclosure" of the names of informants (*id.* at 2A).

The district court ordered the FBI to furnish it with the names and files of 19 informants. It examined these files but declined to determine whether they were privileged or even whether respondents had established a strong showing of need for the names. Instead, although the judge stated that he was " 'reasonably convinced that the identity of the individuals in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation' " (App.

A, *infra,* p. 3A), the court ordered the FBI to turn all of the files over to counsel for respondents.[2] The court stated "that production would not stop with the eighteen [*] files but would undoubtedly go beyond and might encompass the full thirteen hundred informant files" (*id.* at 3A–4A)..

2. The petitioners filed an appeal and sought a writ of mandamus. The court of appeals held that the disclosure order is not an appealable final decision within the meaning of 28 U.S.C. 1291, and it declined to issue a writ of mandamus. The court began with the premise that interlocutory review of discovery orders is ordinarily unavailable and that it would intervene only if the complaining party could show "persistent disregard of the Rules of Civil Procedure[,] a manifest abuse of discretion * * * [or] where the case presents legal questions of first impression or of extraordinary significance" (App. A, *infra,* p. 4A). The court concluded that none of these standards is satisfied here because the scope of the informants' privilege is not a novel issue and because "it is by now well-established that a district judge * * * may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy" (*id.* at 8A). The court acknowledged that "some other circuits have taken a

[2] "The lawyers were ordered to keep the information which they secured confidential" (App. A, *infra,* p. 4A).

[*] When it became clear that the identity of one informant had been publicly disclosed, the documents concerning that informant were furnished to respondents.

more liberal position with regard to the reviewability of interlocutory orders of the type involved herein" but stated that "we are bound to follow this Court's strong policy against review" (*id.* at 10A–11A).

Although it did not reach the merits, the court of appeals pointed out that the identities of informants are presumptively privileged and that "the strength of the privilege is greater in civil litigation than in criminal" (App. A, *infra,* p. 6A). Moreover, the court stated, "[d]isclosure should not be directed simply to permit a fishing expedition * * * or to gratify the moving party's curiosity or vengence" (*id.* at 7A). The court expressed "concern that the course upon which the district judge has embarked will lead to disclosure for which there is no substantial need * * * and to unnecessary rummaging in government files. * * * Although disclosure in small servings effectively precludes appellate review, it does not make the end result more palatable to either the defendants or the public" (*id.* at 9A).

The court of appeals observed that "the identification of informants, once made, will be irreversible on an appeal from the final judgment" (App. A, *infra,* p. 9A), and that, because respondents may well have "no valid cause of action" (*id.* at 9A) and the statute of limitations may be an absolute defense, "a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need, are decided on trial" (*id.* at 10A). The court accordingly stated that "[w]e are far from convinced that [respondents'] attorneys require a wholesale disclosure of informants' identities in order to prepare their case for trial" (*id.* at 10A; footnote omitted) and wrote that it was "hopeful that the district judge will give full consideration to the thoughts here expressed" (*id.* at 11A).

3. While our petition for rehearing was pending in the court of appeals, several conferences were held in the district court. The district court announced that it was prepared to rule that nine of the files were protected by the privilege and that nine should be disclosed, but only if petitioners would forego any further appellate review. When we suggested further possible compromises, the district court announced that these were unacceptable and that it would insist on production of all 18 files in full. Counsel stated that we would consider accepting sanctions under Fed. R. Civ. P. 37—such as allowing every material fact respondents sought to acquire through discovery to be deemed admitted—in lieu of discovery, but the district court responded (February 22, 1978 Tr. 27–28):[4]

> * * * I will state to you and to the FBI that as far as I can see now it is not tolerable or acceptable to this Court to be told that the FBI will defy the order of the Court and accept what you call sanctions.
>
> The purpose of discovery is not to lead to sanctions, it is to lead to discovery. The purpose of the Court order * * * is to get the order obeyed and I think you better reconsider any suggestion, even in advance, of the thought of sanctions. It will not be acceptable to me.

[4] The district court spoke for itself without soliciting the views of counsel for respondents.

> As long as you have suggested it, I want to give you advance notice that I will seriously consider contempt or imprisonment of defiant officials, and I am sure you are aware of that, but I will not hesitate to use that power if there is a willful defiance of a final order of this Court. [5]

REASONS FOR GRANTING THE PETITION

1. As a rule, parties to litigation must either comply with a discovery order or accept sanctions for disobedience. Appellate review is unavailable either by appeal (*United States* v. *Ryan*, 402 U.S. 530) or by mandamus (*Kerr* v. *United States District Court*, 426 U.S. 394). Persons who disagree with the district court's decision may elect to comply, in which event the dispute comes to an end. They may accept sanctions under Fed. R. Civ. P. 37 and appeal any final judgment based on the sanctions.[6] Or they may be adjudicated in contempt and appeal the penalties imposed. This rule serves the purposes of avoiding piecemeal litigation (with its attendant delay) and of weeding out claims and objections by persons who are unwilling to take the risk that they may be wrong.

But the Court also has recognized that the customary rule need not be applied inflexibly. Claims of

[5] Because the files are in the custody of the Department of Justice and are subject to the control of the Attorney General, any order of contempt must run against the Attorney General personally. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462.

[6] That is how the claim of privilege reached this Court in *United States* v. *Reynolds*, 345 U.S. 1.

privilege cannot be evaluated under the ordinary rules of procedure, because "[c]ompliance could cause irreparable injury [and] appellate courts cannot always 'unring the bell' once the information has been released." *Maness* v. *Meyers*, 419 U.S. 449, 460. And courts do not construe the presumption against piecemeal litigation in a way that causes unnecessary conflict between coordinate branches of the government. *United States* v. *Nixon*, 418 U.S. 683, 690–692. In light of these and other considerations, at least two courts of appeals allow the Executive Branch to obtain review, by appeal or mandamus, of orders requiring executive officials to disclose assertedly privileged materials to an opponent in litigation. *Usery* v. *Ritter*, 547 F. 2d 528 (C.A. 10); *United States* v. *Hemphill*, 369 F. 2d 539 (C.A. 4). The court of appeals here acknowledged (App. A, *infra*, pp. 10A–11A) that its decision conflicts with the holdings of those other circuits. This Court should resolve that conflict.

The Executive Branch has been required in recent years to interpose an increasing number of claims of privilege to requests for discovery in suits involving allegations of misconduct by executive officials. Whether the privilege involved is the privilege for state secrets that might affect the national security or, as here, the more common privilege concerning the confidentiality of informants, the assertion of privilege raises the unwelcome prospect of friction between the Executive and Judicial Branches. That friction would

be needlessly aggravated if a cabinet officer must decline to comply with a judicial order simply in order to activate the process of appellate review. It should not be necessary for a district court to hold the Attorney General, the Nation's highest law enforcement officer, in contempt of court before an appellate court will determine whether the district court erred in requiring the disclosure of assertedly privileged information.[7]

Similar considerations led the Court to conclude in *United States* v. *Nixon, supra,* that the President need not be cited for contempt of court before obtaining appellate review of an order requiring him to disclose assertedly privileged information. The Court's analysis applies here as well (418 U.S. at 691–692):[8]

> The requirement of submitting to contempt * * * is not without exception * * *. * * * [T]he traditional contempt avenue to immediate appeal is particularly inappropriate due to the unique setting in which the question arises. To require [the Attorney General] of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be

[7] Any contempt order in this case would be addressed to the Attorney General personally. See note 5, *supra.*

[8] We have substituted "the Attorney General" for "a President" in the quotation to demonstrate that the reasoning is applicable to either officer of the Executive Branch.

> placed in the posture of issuing a citation to [the Attorney General] simply in order to invoke review. The issue whether [an Attorney General] can be cited for contempt could itself engender protracted litigation, [*] and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying * * * action for which his evidence is sought.

The Attorney General is prepared not to comply with the district court's order in this case, if that should be necessary in order to permit appellate review of the order. But it would be pointless to require the Attorney General to take that formal step, which could lead only to confrontation between two branches of the government. Moreover, it would be unseemly for the chief law enforcement officer of the United States, sworn to uphold and obey the law, publicly to disobey a court as the price of obtaining review of a ruling he believes to be both unsound and certain to harm the proper functioning of Government. Where, as here, the Attorney General personally has determined that the documents are covered by a valid privilege, and the Solicitor General has determined that the matter deserves immediate appellate review,[10]

[9] See *United States ex rel. Touhy* v. *Ragen, supra.*

[10] The Solicitor General must approve all appeals or requests for extraordinary writs by executive officials. 28 C.F.R. 0.20(b). The Solicitor General authorizes applications for interlocutory relief only when he believes that the issue is of substantial importance to the United States or when the district court is clearly incorrect. This screening serves to protect appellate courts from the merely dilatory applications that sometimes are filed in private litigation and ensures that cases are not needlessly delayed.

the courts should entertain the request of the Executive Branch that the case be decided on its merits.[11]

2. Appellate review is especially appropriate here, because the district court so plainly has abused its discretion. This Court has held that informants are essential to effective law enforcement and that their identities should not needlessly be revealed. Even in a criminal case, the informants' identities should be revealed only when that is "essential to a fair determination of a cause." *Roviaro* v. *United States,* 353 U.S. 53, 61. See also *Weatherford* v. *Bursey,* 429 U.S. 545, 557. The procedure established by the district court here is not even colorably "essential to a fair determination" of this case.

The district judge acknowledged that he was " 'reasonably convinced that the identity of the [informants] in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation' " (App. A, *infra,* p. 3A). This statement is an acute assessment of the case. Petitioners acknowledge that from 1960 to 1976 approximately 1,300 informants relayed information to the government about respondents, and that approximately 300 of these informants were members of the SWP and YSA. The

[11] Our position is not inconsistent with *Kerr* v. *United States District Court, supra. Kerr* did not involve any potential for conflict between two branches of the federal government. Moreover, the Court observed in *Kerr* that petitioners could apply for and receive *in camera* review of the assertedly privileged materials (426 U.S. at 405–406). Here, by contrast, the district court has declined to make any ruling after *in camera* review concerning the claim of privilege, and the court has emphasized that it will not heed the court of appeals' request to reconsider its decision (see pages 7–8, *supra*).

way in which these informants were used has been exhaustively canvassed in discovery that has included nine sets of interrogatories directed to the FBI, the depositions of at least 18 federal officials, and the disclosure of more than 70,000 documents (*id.* at 2A n. 1).

Perhaps there would be a good argument for disclosure if the names of the informants were essential elements of respondents' case. But respondents may not even have a case. The statute of limitations may extinguish many of the claims here, others may fail because the Federal Tort Claims Act forbids recovery on any claim sounding in assault, misrepresentation or deceit (28 U.S.C. 2680(h)),[12] and still others may fail because the use of informants is not an invasion of any constitutional right.[13] If the court were to agree with any or all of these arguments, that would eliminate any significant need for further discovery.

As the court of appeals put it (App. A, *infra,* p. 10A), "a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need,

[12] See also *Powell* v. *Dellums*, petition for a writ of certiorari pending, No. 77–955, in which we argue that supervisory law enforcement officers should be absolutely immune for exercising their discretion to order law enforcement activity that is later determined to be improper.

[13] See, *e.g.*, *Weatherford* v. *Bursey*, *supra; Hoffa* v. *United States*, 385 U.S. 293; *Lewis* v. *United States*, 385 U.S. 206. Indeed, in an earlier opinion in this very case, the court of appeals stated that the "FBI has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes," and it quoted with approval the statement of another court that " '[t]he use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights' " (App. B, *infra*, p. 18A).

are decided on trial." There is no reason why the district court should direct disclosure of informants' identities in advance of determining that the disclosure is necessary and in advance of considering legal questions that would obviate any need for discovery.[14]

[14] The district court did not order the materials to be disclosed directly to respondents; it instead ordered disclosure only to respondents' attorneys. We have serious doubts about the propriety of that procedure, and the court of appeals' statement (App. A, *infra*, p. 8A) that "it is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy" is simply wrong. See *Black* v. *Sheraton Corp. of America*, 564 F. 2d 531, 542–545 (C.A. D.C.) (district court must resolve claim of privilege *in camera;* disclosure to plaintiff's counsel improper except as a last resort). The court of appeals referred to *United States* v. *Nixon*, *supra*, 418 U.S. at 715 n. 21, as support for its statement, but the note in *Nixon* dealt only with disclosure to the Special Prosecutor, an official of the Executive Branch. The Court did not sanction disclosure outside the government in advance of resolution of the claim of privilege, and it certainly did not approve wholesale delivery of files to counsel in advance of a finding, as a result of *in camera* inspection, that additional assistance was needed concerning a particular document or portion of a document.

In any event, the difference between disclosure to counsel and disclosure to the parties is not of great significance here. One of respondents' attorneys is a member of the SWP (App. A, *infra*, p. 3A n. 3), which brought this suit "on behalf of its past and present members" (Amended Complaint, p. 2). And, as the court of appeals observed (*id.* at 10A n. 4): "while we share the trial judge's confidence in the character and integrity of [respondents'] counsel, we are less sanguine than he concerning their ability to conceal the information which is about to be disclosed to them. Indeed, unless counsel are prohibited from making use of the information thus obtained, the very thrust of their future inquiries may point interested observers directly to many of the [informants] involved." And if counsel were to be prohibited from making use of the information they learn, then there would be no reason why they should have access to it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.
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APRIL 1978.

258-736—78——3

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE UNITED STATES OF AMERICA, PETITIONER

SOCIALIST WORKERS PARTY ET AL.,

PLAINTIFFS-APPELLEES,

v.

THE ATTORNEY GENERAL ET AL.,

DEFENDANTS-APPELLANTS.

(No. 1562, Docket 77-3041)

Argued Aug. 19, 1977.

Decided Oct. 11, 1977.

Before VAN GRAAFEILAND and WEBSTER,* Circuit Judges, and DOOLING, District Judge.**

VAN GRAAFEILAND, Circuit Judge:

This action was commenced in 1973 by the Socialist Workers Party (SWP), the Young Socialist Alliance (YSA) and several individual members of these organizations. Their second amended complaint, which seeks both injunctive relief and some $40 million dollars in compensatory and punitive damages from the United States and various officials and em-

*Of the Eighth Circuit, sitting by designation.

**Of the Eastern District of New York, sitting by designation.

ployees, recites a litany of alleged wrongful acts on the part of the defendants beginning in 1938, including blacklisting, harassment, disruption, wiretapping, mail tampering, breaking and entering, and assault. Plaintiffs have had broad discovery by way of interrogatories, depositions and production of documents.[1] This has disclosed that since 1960 some thirteen hundred unidentified persons have provided information concerning plaintiffs on at least two occasions to the FBI and, of these, approximately three hundred were at one time members of SWP or YSA, or both. This appeal concerns the disclosure of their identities.

From the outset of discovery, plaintiffs have insisted that they would be satisfied with nothing less than the names of all informants. They contend that the informants would not be endangered by this disclosure and that, because the investigation of SWP and YSA has been terminated, the informants no longer provide a continuing source of information to the government which should be preserved. Defendants have just as adamantly asserted that none of the informants should be identified, contending that the government's ability to gather information for general law enforcement purposes would be severely damaged by disclosure in this case and that plaintiffs have failed to show that their need for disclosure outweighs the public interest in encouraging the flow of information from confidential sources.

[1] Approximately seventy thousand documents have been turned over to plaintiffs by governmental agencies, approximately fifty-three thousand of these by the FBI. Nine sets of interrogatories have been directed to the FBI alone. At least eighteen depositions have been taken, twelve of them of FBI employees.

The district judge, faced with an almost insoluble problem, has had difficulty in coming to grips with it. The matter was brought to a head by plaintiffs' motion for an order directing the FBI to furnish the names of eighteen informants, theretofore identified only by code numbers, and to produce all documents relating to them. The district judge conducted an *in camera* inspection of the twenty-five file drawers of documents involved in this request, directed the government to prepare summaries of the files, and set forth a list of subjects which he wanted covered in the summaries. He stated that it might be necessary for the government to provide plaintiffs with similar information relating to all the informant files and indicated his belief that this could probably be done without any substantial revelation of the identity of informants, because he was "reasonably convinced that the identity of the individuals in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation."

Plaintiffs' counsel reasserted, however, that plaintiffs were unwilling to settle for anything less than disclosure of the names of all informants, and the district judge thereupon issued the oral *in camera* order which is the subject of this appeal. In a somewhat discursive ruling, he stated that plaintiffs' counsel must have access to the detailed facts about the use of informants and that the FBI must provide the eighteen files [2] for inspection by four attorneys representing the plaintiffs.[3] He stated also that production would not stop with the eighteen files but would undoubtedly

[2] The FBI has withdrawn its objection as to one of the files, because plaintiffs already know the name of the informant.

[3] One of the four attorneys is also a member of SWP.

go beyond and might encompass the full thirteen hundred informant files. The lawyers were ordered to keep the information which they secured confidential and, indeed, not to make public the disclosure procedure which the court had decided to follow.

Defendants seek review of this order under both 28 U.S.C. §§ 1651 and 1291, relying as to the latter section upon the collateral order rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Plaintiffs concede that this Court has jurisdiction. However, jurisdiction cannot be conferred by agreement of the parties, *Stratton* v. *St. Louis Southwestern Railway*, 282 U.S. 10, 18, 51 S.Ct. 8, 75 L.Ed. 135 (1930); *IBM Corp.* v. *United States*, 493 F. 2d 112, 119 (2d Cir. 1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed. 2d 774 (1974), and it is the court's duty to determine whether the order is cognizable for review. *United States* v. *Cusson*, 132 F. 2d 413, 414 (2d Cir. 1942).

In *Xerox Corp.* v. *SCM Corp.*, 534 F. 2d 1031 (2d Cir. 1976), where appellate review was sought of pretrial discovery orders of documents assertedly protected by the attorney-client privilege, this Court reiterated its longstanding position against reviewability. We stated that in the absence of a 28 U.S.C. § 1292(b) certification, a persistent disregard of the Rules of Civil Procedure or a manifest abuse of discretion, interlocutory review of pretrial discovery orders would not be permitted. We also indicated that review might be allowed where the case presents legal questions of first impression or of extraordinary significance. The district judge has not certified this matter for appeal. Unless, therefore, the application to this Court satisfies one of the alternative requirements

for reviewability, we are bound by our prior decisions to deny review.

The question of informer privilege is, of course, not one of first impression. It is an ancient doctrine with its roots in the English common law, 3 *Russell on Crimes,* at 592–93 (6th ed. 1896), founded upon the proposition that an informer may well suffer adverse effects from the disclosure of his identity. Illustrations of how physical harm may befall one who informs can be found in the reported cases. *See, e.g., In Re Quarles,* 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080 (1895); *United States* v. *Toombs,* 497 F. 2d 88, 90 n.1 (5th Cir. 1974); *Swanner* v. *United States,* 406 F. 2d 716 (5th Cir. 1969); *Schuster* v. *City of New York,* 5 N.Y. 2d 75, 180 N.Y. S. 2d 265, 154 N.E. 2d 534 (1958). However, the likelihood of physical reprisal is not a prerequisite to the invocation of the privilege. Often, retaliation may be expected to take more subtle forms such as economic duress, blacklisting or social ostracism. *See Usery* v. *Local 720, Laborers' International Union of North America,* 547 F. 2d 525, 527 (10th Cir.), *petition for cert. denied,* —— U.S. ——, 97 S.Ct. 2649, 53 L.Ed. 2d 255 (1977); *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.,* 459 F. 2d 303, 306 (5th Cir. 1972); *Wirtz* v. *Continental Finance & Loan Co.,* 326 F. 2d 561, 563–64 (5th Cir. 1964); *Mitchell* v. *Roma,* 265 F. 2d 633, 637 (3d Cir. 1959); *Hodgson* v. *Keeler Brass Co.,* 56 F.R.D. 126, 127–28 (W.D.Mich.1972); 8 Wigmore, *Evidence* § 2374 at 762 (McNaughton Rev. 1961). The possibility that reprisals of some sort may occur constitute nonetheless a strong deterrent to the wholehearted cooperation of the citizenry which is a requisite of effective law enforcement.

Courts have long recognized, therefore, that, to insure cooperation, the fear of reprisal must be removed and that "the most effective protection from retaliation is the anonymity of the informer." *Wirtz* v. *Continental Finance & Loan Co., supra,* 326 F. 2d at 563–64; *see also McCrary* v. *Illinois,* 386 U.S. 300, 306–09, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967); *Usery* v. *Local 720, supra,* 547 F. 2d at 527. "By withholding the identity of the informer, the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice." *United States* v. *Tucker,* 380 F. 2d 206, 213 (2d Cir. 1967). Congress, also, has recognized the importance of this protective measure. *See, e.g., United States* v. *Greenwood Municipal Separate School District,* 406 F. 2d 1086, 1089–1090 (5th Cir.), *cert. denied,* 395 U.S. 907, 89 S. Ct. 1749, 23 L. Ed. 2d 220 (1969).

The doctrine of informer privilege is applied in civil cases as well as criminal. *Wirtz* v. *Continental Finance & Loan Co., supra,* 326 F. 2d at 563, and limits the right of disclosure under Rule 34 of the Federal Rules of Civil Procedure. *Wirtz* v. *Robinson & Stephens, Inc.,* 368 F. 2d 114, 116 (5th Cir. 1966). Indeed, there is ample authority for the proposition that the strength of the privilege is greater in civil litigation than in criminal. See *United States* v. *Carey,* 272 F. 2d 492, 493 (5th Cir. 1959); *Mitchell* v. *Roma, supra,* 265 F. 2d at 637–38; *Black* v. *Sheraton Corp.,* 47 F.R.D. 263, 272 (D.D.C. 1969); *Bocchicchio* v. *Curtis Publishing Co.,* 203 F. Supp. 403, 407 (E.D. Pa. 1962). However, the privilege is

not absolute in either. Where the identification of an informer or the production of his communications is essential to a fair determination of the issues in the case, the privilege cannot be invoked. *Roviaro* v. *United States,* 353 U.S. 53, 60–61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *United States* v. *Alexander,* 495 F. 2d 552, 553 (2d Cir. 1974).

The burden of establishing the need for disclosure is upon the person who seeks it. *United States* v. *Prueitt,* 540 F. 2d 995, 1004 (9th Cir. 1976), *cert. denied,* 429 U.S. 1063, 97 S. Ct. 790, 50 L. Ed. 2d 780 (1977). This burden is not met by mere speculation that identification might possibly be of some assistance. *United States* v. *Prueitt,* 540 F. 2d at 1003; *United States* v. *D'Amato,* 493 F. 2d 359, 366 (2d Cir.), *cert. denied,* 419 U.S. 826, 95 S. Ct. 43, 42 L. Ed. 2d 50 (1974). Disclosure should not be directed simply to permit a fishing expedition, *United States* v. *Berrios,* 501 F. 2d 1207, 1211 (2d Cir. 1974); *Waldron* v. *Cities Service Co.,* 361 F. 2d 671, 673 (2d Cir. 1966), *aff'd sub nom. First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968), or to gratify the moving party's curiosity or vengeance, *Shore* v. *United States,* 60 App. D.C. 137, 141 49 F. 2d 519, 523 (1931), but only after the trial court has made a determination that plaintiff's need for the information outweighs the defendant's claim of privilege. *Kerr.* v. *United States District Court,* 426 U.S. 394, 405, 96 S. Ct. 219, 48 L. Ed. 2d 725 (1976).

District courts have the inherent power to hold *in camera* proceedings, *United States* v. *Hurse,* 453 F. 2d 128, 130–31 (8th Cir. 1971), *cert. denied,* 414 U.S. 908, 94 S. Ct. 245, 38 L. Ed. 2d 146 (1973), and this is a

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"highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr* v. *United States District Court, supra,* 426 U.S. at 406, 96 S. Ct. at 2126. The district judge has made an *in camera* inspection of the eighteen files at issue but has refused to rule on their confidentiality. Instead, he has thrown them open to inspection by four attorneys representing the plaintiffs and has indicated his intention to permit similar inspection of additional files. It is the contention of the defendants that the district judge, in thus attempting to determine "whether the circumstances are appropriate for the claim of privilege", is in fact "forcing a disclosure of the very thing the privilege is designed to protect." *United States* v. *Reynolds,* 345 U.S. 1, 8, 73 S. Ct. 528, 532, 97 L. Ed. 727 (1953). Defendants assert that, if the purpose of the informer privilege rule is to encourage cooperation through the promise of anonymity, this purpose will be ill-served by a practice of delivering informants' files to opposing counsel. The district judge's ineffective direction that this procedure, which he had adopted, not be made public indicates that he was aware of the problem.

However, it is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy. *See, e.g., United States* v. *Nixon,* 418 U.S. 683, 715 n. 21, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *United States* v. *Anderson,* 509 F. 2d 724, 729 (9th Cir.), *cert. denied,* 420 U.S. 910, 95 S. Ct. 831, 42 L. Ed. 2d 840 (1975). The order appealed from does not therefore create an issue of first impression or extraordinary signicance, nor was its issuance an abuse of discretion which warrants appellate review.

We would be remiss, however, if we did not express our concern that the course upon which the district judge has embarked will lead to disclosure for which there is no substantial need, *Brennan* v. *Engineered Products, Inc.,* 506 F. 2d 299, 303 (8th Cir. 1974), and to unnecessary rummaging in government files. *Taglianetti* v. *United States,* 394 U.S. 316, 317, 89 S. Ct. 1099, 22 L. Ed. 2d 302 (1969); *Donohoe* v. *Duling,* 330 F. Supp. 308, 312 (E.D. Va. 1971), *aff'd,* 465 F. 2d 196 (4th Cir. 1972). Although disclosure in small servings effectively precludes appellate review, it does not make the end result more palatable to either the defendants or the public. As has been well said, "the general disclosure of informants' identities to defense counsel is likely to compromise the fundamental public policy underlying the [informer] privilege." Levine, *The Use of In Camera Hearings in Ruling on the Informer Privilege,* 8 U. Mich. J. L. Ref. 151, 171 (1974).

Defendants argue forcibly that plaintiffs have no valid cause of action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.,* or the Constitution and rely in addition upon the two year statute of limitation contained in 28 U.S.C. § 2401(b) as a valid defense. These issues are not now before us but will be determined by the district court on the trial. However, the identification of informants, once made, will be irreversible on an appeal from the final judgment. *Metros* v. *United States District Court,* 441 F. 2d 313, 315 (10th Cir. 1971). As this Court stated when this case was before it on a prior appeal, the district court should weigh "the serious prejudice to the

Government from compromising some or all the informants for all time, even though the final determination of the action may be for the defendants." *Socialist Workers Party* v. *Attorney General,* 510 F. 2d 253, 257 (2d Cir. 1974).

We are far from convinced that plaintiffs' attorneys require a wholesale disclosure of informants' identities in order to prepare their case for trial.[4] The activities of the informants have been extensively disclosed in the discovery already had, and most of the other proof necessary to establish plaintiffs' claim is already in plaintiffs' possession. In this case, which probably will be tried without a jury, *see O'Connor* v. *United States,* 269 F. 2d 578, 585 (2d Cir. 1959), a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need, are decided on trial. See *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. 689, 697, 53 S. Ct. 736, 77 L. Ed. 1449 (1933); *Usery* v. *Local 720, supra,* 547 F. 2d at 528; *Ellingson Timber Co.* v. *Great Northern Ry. Co.,* 424 F. 2d 497, 499 (9th Cir.), *cert denied,* 400 U.S. 957, 91 S. Ct. 354, 27 L. Ed. 2d 265 (1970); *United States* v. *Schine Chain Theatres,* 4 F.R.D. 108, 109 (W.D. N.Y. 1944).

In summary, although some other circuits have taken a more liberal position with regard to the re-

[4] Moreover, while we share the trial judge's confidence in the character and integrity of plaintiffs' counsel, we are less sanguine than he concerning their ability to conceal the information which is about to be disclosed to them. Indeed, unless counsel are prohibited from making use of the information thus obtained, the very thrust of their future inquiries may point interested observers directly to many of the individuals involved.

viewability of interlocutory orders of the type involved herein, *see, e.g., Usery* v. *Ritter,* 547 F. 2d 528, 532 (10th Cir. 1977); *Metros* v. *United States District Court, supra,* 441 F. 2d at 315, we are bound to follow this Court's strong policy against review. However, as in *Baker* v. *United States Steel Corp.,* 492 F. 2d 1074 (2d Cir. 1974), we are hopeful that the district judge will give full consideration to the thoughts here expressed.

Appeal dismissed and application of writ of mandamus denied.

DOOLING, District Judge.

I concur in the result.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(No. 638, Docket 74-2640)

SOCIALIST WORKERS PARTY, ET AL.,
PLAINTIFFS-APPELLEES

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS-APPELLANTS

Argued December 24, 1974.
Decided December 24, 1974.

Before FRIENDLY, TIMBERS and GURFEIN, Circuit Judges.

PER CURIAM:

In this action, filed in the District Court for the Southern District of New York in July, 1973, the Socialist Workers Party (SWP), its youth-arm, Young Socialist Alliance (YSA), and several members sought wide ranging injunctive and monetary relief against a large number of Government officials with respect to alleged activities directed against the two organizations. Various pretrial steps had been taken, and trial early in 1975 appeared to be in prospect. On October 25, 1974, plaintiffs moved for what was styled a "preliminary" injunction restraining the Director of the Federal Bureau of Investigation (FBI) and his agents "from attending, surveilling, listening to, watching, or in any way monitoring the

fourteenth National Convention of plaintiff Young Socialist Alliance to be held at the Jefferson Hotel in St. Louis, Missouri, from December 28, 1974, through January 1, 1975, and further restraining them from threatening any of the said acts and from causing or threatening to cause any of the said acts." After receiving affidavits and hearing counsel on three occasions, Judge Griesa, on December 13, 1974, rendered an extensive oral opinion and entered an order granting the injunction sought.[1] The defendants promptly appealed and moved for a stay [2] and for a reference or an expedited appeal, claiming *inter alia* that non-attendance by the informants would compromise their usefulness and even entail risk to their safety. On December 19 we set a briefing schedule which would bring the motions on for argument on December 24. Since decision on the motion for a stay would in effect determine the appeal and the briefs appeared to include all considertions relevant thereto, we later advised counsel that we would hear the appeal itself.

A few facts are undisputed: The convention is open for attendance by any person under the age of 29. This is true even of "delegated" sessions where only elected delegates may speak and vote but all registrants are welcome as observers. Persons attending the meeting wear identification badges. There is to be no electronic surveillance. Although at one time the FBI had developed a program to engage in disruptive activities at SWP and YSA conventions, this was formally discontinued in April 1971, and there is nothing to show it has been renewed. While the district judge and the plaintiffs make some

[1] The order specifically included confidential informants.

[2] Judge Griesa had denied a stay.

general references to "surveillance", the Government has represented that at the 1974 convention there will be none in the ordinary sense and that the investigating method will be the use of informants who will attend the meetings as any member of the public, including the press, has been allowed to do. Despite some contrary allegations by the plaintiffs, there is no evidence that the FBI sends the names of persons attending the conventions outside the Federal Government; it does send them to the Civil Service Commission which has made use of them as a basis for questioning those who are Government employees or seek Government employment.

Although not disputing that at one time the SWP aimed at the overthrow of the government of the United States by force and violence, plaintiffs assert and the district court found that this policy had long since been formally abandoned. The Government contends, however, that, despite official disapproval, a minority in the SWP, called the Internationalist Tendency (IT), endorses and supports the current use of violence in line with the views of the International Majority Tendency of the Fourth International, a Trotskyist-communist organization headquartered in Europe with which SWP, although claiming not to be affiliated, concedes it has "a sympathetic, fraternal relationship." The FBI has also come upon information indicating that the IT regards as its "most important priority" an "interventionist" role in the YSA which will lead that organization to adopt the revolutionary aims of the IT.[3]

[3] Some of these details are contained in reply affidavits submitted on the motion for a stay. Plaintiffs have moved to strike these, and particularly to strike an affidavit with respect to the nature of the informants which was submitted *in camera* in line with an offer of proof made by the defendants to the district judge in an unsuccessful effort to obtain a modification of the injunction which would allow the informants to attend on condition that they not report to the FBI. These affidavits flesh out material already in the record; the need for this has arisen in part from the fact that the district judge proceeded on the basis of affidavits, rather than heeding our news that, except in cases of urgency, disputed issues of fact relevant to the issuance of temporary injunctions should not be so determined. *SEC* v. *Frank*, 388 F. 2d 486, 490–493 (2d Cir. 1968). In part the need arose from extra record references in appellee's memorandum in opposition to the motion for a stay. For example, when appellees say in opposing a stay: "There is not a shred of evidence that this policy [of disruption] has ever been repudiated or withdrawn as a key factor in FBI decisions or operations concerning plaintiffs", it was appropriate for the defendants to submit an affidavit that there is also not a "shred of evidence" that the policy has continued. Technically the affidavits are properly before us only on the motion for a stay; although the issues on this and the appeal are almost inextricable, we have considered them only in that context.

At first blush there would hardly seem to be a role less appropriate for or capable of effective performance by the federal judiciary than advance supervision of the investigative methods of the FBI on a case-by-case basis, particularly in the field of national security. Recent instances where national security has been inappropriately invoked should not obscure that, as the Supreme Court has observed, "unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered," *United States* v. *United States District Court,* 407 U.S. 297, 312, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752 (1972), where the Court also quoted from Chief Justice Hughes' opinion in *Cox* v. *New Hampshire,* 312 U.S. 569, 574, 61 S. Ct. 762, 765, 85

L. Ed. 1049 (1941).[4] The Government distinguishes the Supreme Court decisions mainly relied on by plaintiffs, notably *NAACP* v. *Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *Bates* v. *Little Rock,* 361 U.S. 516, 523, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960); *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963), and *DeGregory* v. *New Hampshire,* 383 U.S. 25, 829, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966), on the ground that these did not involve the judiciary in exercising prior restraints on an investigative agency in the executive or legislative branch but rather represented a refusal to permit legal processes to be used against individuals or associations in a manner violative of First Amendment rights. Indeed, it claims that the injunction here issued flies in the face of the holding in *Laird* v. *Tatum,* 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), that a complaint seeking to enjoin the Army's data-gathering system with respect to lawful civilian political activity did not present a justiciable controversy. It relies particularly on the statement, 408 U.S. at 15, 92 S. Ct. at 2326:

> Carried to its logical end, this approach [of the Court of Appeals for the District of Columbia Circuit, 144 U.S. App. D.C. 72, 444 F. 2d 947, 958] would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary,

[4] "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

> absent actual present or immediately threatened injury resulting from unlawful governmental action.

The district judge and the appellees say that this case comes within the qualification at the end of this wise observation of the Chief Justice. Although a number of reasons are asserted, two appear to be most important. The one principally relied on by the district judge was that plaintiffs in *Laird* v. *Tatum* had showed only a "subjective chill" whereas the plaintiffs here had submitted affidavits asserting that attendance at YSA conventions had in fact been discouraged by knowledge of FBI surveillance plans. The other is the lack of as much justification for the FBI's surveillance as was thought to exist for the Army's plan to inform itself with respect to dissident student organizations so as to be better able to cope with disorders if required to do this on short notice.

We are not greatly persuaded with respect to the validity of these or other asserted distinctions, on the facts presently before us. Save possibly for the communication of names to the Civil Service Commission, the FBI's use of the information gathered by it from attendance at the YSA conventions seems parallel to that of the Army as described in Mr. Justice Douglas' dissent in *Laird* v. *Tatum,* 408 U.S. at 24–25, 92 S. Ct. 2318. Moreover, the Court of Appeals in that case had characterized the plaintiffs' claim as being that the Army surveillance "exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights . . .", 444 F. 2d at 954 (emphasis in original), and it is hard to see why the attendance of FBI informants at YSA conventions should have more of an inhibiting effect

than the Army's surveillance of student organizations. With respect to the second ground, the bite of the decision in *Laird* v. *Tatum* was that, absent a stronger showing of "chill" than was made by the plaintiffs there, the courts were not to go into this. If the issue is open for inquiry, while the possibilities of the dissident wing in SWP being able to gain control and effectuate its desires to convert YSA into a violent movement may be less than the risks of serious student disorders in the late 1960's, the stakes are greater. The FBI has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes; it is not obliged to wear blinders until it may be too late for prevention. As Judge Weinfeld observed in *Handschu* v. *Special Services Division*, 349 F. Supp. 766, 769 (S.D.N.Y. 1972):

> The use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights.

Although plaintiffs apparently concede that use of informants need not await the existence of probable cause for arrest, we have not been informed either by them or by the district judge what they think the proper standard to be. Moreover, while plaintiffs' case here may be better than Tatum's in some respects, it is weaker in another. A major basis for the attack there, certainly the most significant factor for the dissenters, was that investigation had been conducted by the Army as distinguished from a civilian investigative agency.

The underlying action here raises the issue so eloquently described by Mr. Justice Jackson nearly twenty-five years ago:

> The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression.

American Communications Ass'n v. *Douds*, 339 U.S. 382, 445, 70 S. Ct. 674, 707, 94 L. Ed 925 (1950) (concurring and dissenting). It does this in the special context of whether the conduct sought to be protected is a legitimate area for investigation. Such an issue deserves treatment on a full record and with ample time for reflection, initially by the district judge, later by this court, and perhaps ultimately by higher authority. There was no urgency requiring the district judge to decide issues of such gravity by granting an injunction against the FBI's continuing, for one more YSA convention, the practices it had followed for many years, apparently without serious injury to the plaintiffs, and confronting us with the need of acting within a few days, in the midst of a crowded calendar, on a problem deserving weeks of consideration and opinion writing on a proper record. The plaintiffs made no showing sufficient to justify issuance of an injunction on the basis of conflicting affidavits, see note 3, and reliance on what they term "informed representations of counsel" with respect to the involved relationships of SWA, its members, and other organizations. Plans for attending the convention on December 28 must largely have been made, or not made, well before the injunction was issued on December 13. The only benefits to plaintiffs in relieving the "chill" allegedly created by the FBI were the possibility that the injunction, if sufficiently publicized, might lead some with souls less courageous than those of the indi-

vidual plaintiffs, see 408 U.S. at 7–8 n. 7, 92 S. Ct. 2318, to decide to attend after all, and to encourage greater freedom by participants in advocating the revolutionary tactics which the plaintiffs claim to abhor. Even on this the benefit is simply the incremental difference between fear of revelation by prearranged informants and of voluntary reports by others who are free to attend these public meetings; no one has yet suggested that the FBI be restrained from receiving information freely reported to it. Against this is the serious prejudice to the Government from compromising some or all the informants for all time, even though the final determination of the action may be for the defendants. Whatever may be the ultimate merits of plaintiffs' case, there was no occasion for a rush to judgment with respect to the Fourteenth YSA convention when the proof was that the FBI was proposing to do only what—indeed apparently less than—it had done without serious adverse effect before. We hold therefore that issuance of the broad injunction on this inadequate record was an abuse of discretion.

One respect in which the balance may tip in favor of the plaintiffs is the FBI's practice of transmitting to the Civil Service Commission the names of persons attending the convention. Apparently defendants concede that such attendance would not justify dismissal from or denial of employment. See *Gordon* v. *Blount*, 336 F. Supp. 1271 (D.D.C. 1971). This is the point most stressed by the plaintiffs in seeking to show "objective chill", and we think the values of preserving freedom of association justify enjoining such transmission pending final determination of the ac-

tion or earlier order of the district court or this court. We shall hold the Government to its representation that no transmission is made outside the Federal Government.

With this exception, the injunction is vacated. The various motions are thus rendered moot. The mandate will issue forthwith. No costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of October, one thousand nine hundred and seventy-seven.

Present: Hon. Ellsworth A. Van Graafeiland, Hon. William H. Webster, Circuit Judges; Hon. John F. Dooling, District Judge.

77–3041

In Re:

UNITED STATES OF AMERICA

A petition for a writ of mandamus having been filed and argument having been had thereon,

Upon consideration thereof, it is

Ordered, adjudged and decreed that the petition for a writ of mandamus be and it hereby is denied and the appeal dismissed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

By ARTHUR HELLER,
Deputy Clerk.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of March, one thousand nine hundred and seventy-eight.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge;* HON. JOHN F. DOOLING, *District Judge.*

IN RE: UNITED STATES OF AMERICA
(77–3041)

A petition for a rehearing having been filed herein by counsel for the petitioner

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

(No. 73 Civ. 3160)

SOCIALIST WORKERS PARTY AND YOUNG SOCIALIST ALLIANCE, ET AL., PLAINTIFFS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

Dec. 13, 1974.

OPINION OF THE COURT

GRIESA, District Judge.

This is a motion brought by plaintiffs for a preliminary injunction restraining one of the defendants, namely, the Director of the Federal Bureau of Investigation, from having his organization conduct any surveillance or monitoring of the 14th National Convention of the Young Socialist Alliance, planned to be held at the Jefferson Hotel in St. Louis, Missouri, from December 28, 1974 through January 1, 1975.

I will refer to the Young Socialist Alliance as the YSA, as we have done in the arguments.

The YSA is one of the plaintiffs in this action, which seeks broad relief against what the plaintiffs consider to be the illegal surveillance and harass-

ment carried on by the various governmental officials and agencies against the plaintiffs.

The YSA is an unincorporated association, with headquarters in New York. Its basic function is that it is the youth arm of another one of the plaintiffs, namely, the Socialist Workers Party, which I will refer to as the SWP.

Both the SWP and the YSA advocate the replacement of capitalism with socialism in the United States. Their specific doctrines will be discussed at greater length later in my opinion.

The motion for preliminary injunction is granted, for the following reasons.

Let me first summarize the salient facts.

The record indicates that the YSA convention will be open to delegates and also other young people under the age of twenty-nine, which is the cut-off age for the YSA. The convention will be open to other young people interested in learning about the YSA and the SWP. There will be workshops, panel discussions and other meetings, at which both members and other interested young people will be permitted to attend. There will apparently be official delegates to this convention which will have certain voting rights, and there will be at least one meeting where only the delegates are permitted for the purposes of voting for the YSA National Committee.

One of the principal events of the convention will be the announcement by the SWP of its candidates for president and vice president of the United States for the 1976 election. It is planned to have a rally at the Hotel Jefferson, at which this announcement is made. The public will be invited to this rally.

Although the meetings contemplated have various degrees of public or private characteristics, as I have described, basically the intention is to have only persons coming to participate in the meetings as interested observers or participants, and it would appear that if someone attempted to attend any of these meetings and was considered undesirable by the YSA or the SWP, those organizations would have the right to refuse admission to such unwanted persons.

It appears that the FBI has for many years had an investigatory interest in the SWP and the YSA, because it has considered that these organizations are Marxist revolutionary organizations, whose purpose is the illegal overthrow of the United States Government.

The FBI apparently has for many years carried on surveillance at the National Conventions and other meetings of the YSA and also of the SWP. The FBI has stated plainly in this action and has otherwise indicated that it intends, unless barred by court order, to carry out surveillance of the YSA convention coming up on December 28th. Indeed, in August or September of this year, the FBI paid a call to the offices of the Hotel Jefferson to inquire about what banquet rooms and guest rooms were being reserved for YSA convention attendance, and the FBI told the hotel management that it would carry out surveillance of the convention.

The FBI has filed affidavits stating that it intends to have confidential informants attending the convention meetings to find out the identity of persons attending and to find out the substance of the discussions held.

The FBI denies that it intends any electronic surveillance or searches or photographing.

The YSA claims that this proposed surveillance has placed or threatens to place a substantial inhibition on the ability of the YSA and its members and other persons who would be interested in attending to carry out the convention in a free and normal manner.

One of the principal reasons why it is plain that the FBI proposed surveillance will place restrictions on the convention is related to what the FBI intends to do with the information obtained from the surveillance. The record demonstrates quite clearly that the FBI, despite the abolition of the well-known Attorney General's list, still considers that the SWP and the YSA are revolutionary organizations, dedicated to the overthrow of the constitutional form of government of the United States by force and violence.

It appears that when the FBI learns of a person's affiliation with the YSA or the SWP or learns of a person's attendance at the meetings of those organizations, the FBI records such information in its files. A principal use of such information is to inform United States Government departments and agencies of such facts in the event that an SWP or YSA member or someone attending its functions seeks employment with such government department or agency.

It appears that the FBI informs the government department or agency of the connection of the person with the YSA or the SWP and states to the government department or agency that these organizations are dedicated to violent revolution in the way that I have described. This results in obvious problems to the persons seeking the government employment, including being subjected to extremely searching questioning about political beliefs.

The record does not disclose in detail what does and does not happen in the case of such employment ap-

plications, but it appears clear to me that the procedure does place a very substantial onus and burden upon the persons involved.

Returning to discussion of the upcoming convention, the record shows quite clearly that the FBI surveillance of such meetings and the FBI procedures as far as use of information is concerned are quite well known among persons who consider attending the YSA convention and that they operate as a substantial deterrent to such attendance. The record shows that persons who have been engaged in attempting to recruit attendance for the conventions have encountered instances of people who state that they would be interested in attending but are afraid to attend because of this FBI surveillance.

Beyond the specific instances which have been cited in the affidavits, it appears to me that a natural consequence under the circumstances is that the FBI surveillance would inevitably put a substantial inhibition and barrier upon the normal carrying out of these meetings and the normal ability to attract young persons to attend them.

It seems to me also clear that the fear of people with regard to attending at the meetings is not a mere mirage but it is a reasonable fear in light of what the FBI does with the information obtained by it at these meetings.

There are other facts to be discussed at a later point, but this is probably the appropriate juncture to discuss the first question of law.

The threshold question of law to be dealt with is whether there is a justiciable controversy. This is the Government's formulation of the question, and I think it is probably a satisfactory one.

The plaintiffs are relying upon a contention that their First Amendment rights of freedom of speech and freedom of association are threatened with substantial impairment. The defendants deny this contention and rely on the line of authorities which hold that if there is no actual prohibition against the exercise of First Amendment freedoms but merely a subjective, self-induced chill on the exercise of those rights and freedoms, then there is no cognizable right upon which a court can grant relief.

The principal reliance of the Government is upon the Supreme Court decision in *Laird* v. *Tatum*, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154, a decision in 1972. The majority opinion in that case was written by Chief Justice Burger and joined in by Justices White, Blackmun, Powell and Rehnquist. Justices Douglas, Marshall, Harlan and Stewart dissented.

The case dealt with intelligence gathering activities of the United States Army which were being carried out to help meet the instances of domestic violence and terrorism which were being carried out and threatened at that period.

The plaintiffs in that action filed suit, claiming that their political rights, their First Amendment rights were being inhibited and stifled by this intelligence gathering activity of the United States Army.

The majority opinion held that there was no valid cause of action. At page 13 of the majority opinion, there is a statement of the holding that there was no indication that the plaintiffs had sustained or were immediately in danger of sustaining a direct injury as a result of the Army's actions. There was merely the amorphous claim that the very existence of the Army's data gathering system created somehow a

chilling effect on First Amendment rights. In other words, the specific claim of a specific injury which is presented in this case was not presented in *Laird* v. *Tatum*.

I do not mean to oversimplify the application of the *Laird* v. *Tatum opinion*. The questions I raised in oral argument are difficult ones. There is language at page 11 in the opinion which the Government with much force argues applies directly to our present case and prevents relief here. However, I believe that the *Laird* v. *Tatum* opinion must be applied on its facts and that the language of the majority opinion must be read in the context of those facts, and on this basis I am holding that the *Laird* v. *Tatum* opinion does not preclude relief in the present case.

Another case relied on by the Government is the Second Circuit decision in *Fifth Avenue Peace Parade* v. *Gray,* 480 F. 2d 326 (2nd Cir. 1973). To me, this case is clearly inapplicable. There, the FBI activity had an entirely different purpose from what is contemplated here. The FBI was seeking information about the numbers of demonstrators which would be converging on Washington for the Vietnam Moratorium in November 1969.

The Court of Appeals, in an opinion written by Judge Mulligan, relied specifically on that fact. He further noted that there was no attempt to make notations about identities of persons, no attempt to use or gain information for any other purpose than to insure the orderly handling of crowds in connection with this moratorium. Consequently, he held that there was no reasonable basis for finding any chill whatever upon the First Amendment rights of the plaintiffs.

It seems to me that the line of authortiy which is relevant is found in the case which have held that First Amendment rights can be violated by disclosure of membership in controversial organizations. I refer to *Gibson* v. *Florida Legislative Commission,* 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929, and other, similar cases. These authorities hold that there is a valid First Amendment claim presented when a governmental authority seeks to obtain information about the identities of the members of organizations such as the NAACP or the Republican Party in Southern states et cetera, and that the organizatoins have standing to protect their members from unwarranted invasions by the government of rights to association and privacy.

One of the ideas used in the reasoning of these cases is that when the objective of a group is unpopular at a given time, revelation of the identities of those who have joined together may provoke reprisals from those opposed to the group.

I believe that those cases apply here, in view of the fact that one of the principal activities, if not the principal activity of the FBI in the contemplated surveillance would be to record the identities of the parties for use in the manner which I have described.

I realize that there are distinctions which can be drawn between the present case and the membership list cases. For instance, it can be argued that when people attend a public or semi-public meeting, they somehow waive the right to privacy which is protected in the membership list cases. However, on balance, I find that that distinction is not a compelling one. I do not believe that a person who attends a meeting such as the one we are talking about inevitably waives his right to have his attendance a

more or less private matter and not subject to Government surveillance. If he goes beyond this and manages to get his picture and name published in the party paper or something like that, this would be a different matter, but we are not talking about that kind of people. We are talking about the rank and file of the young people who apparently wish to attend this type of meeting with something less than that much notoriety.

Finally, we are dealing with the basic problem of inhibiting the right of association, and the record before me indicates convincingly that the presence of FBI informants at the meeting will do this. In my view, this is sufficient ground for holding that there is a justiciable controversy about the invasion of First Amendment rights.

The case most directly on point is a case decided by the then District Judge Swygert, who is now Chief Judge of the Seventh Circuit, and I have reference to *Local 309* v. *Gates,* 75 F. Supp. 620, a case decided in the Northern District of Indiana in 1948. Judge Swygert held that a union was entitled to injunctive relief against police surveillance at union meetings, that there was a strike in progress, and there had been violence in connection with the strike.

The police argued that they were entitled to monitor the meetings in order, among other reasons, to check on possible violence. Judge Swygert found as a fact that although there had been violence in the strike, there was no indication that the meetings had any relationship to violence. He further found that the inhibiting effect upon right of association was a natural result of the surveillance. He found factual indications of such inhibiting effect and granted the in-

junctive relief on the basis of First Amendment violations.

The second branch of our problem relates to the question of whether the Government has a valid reason for invading the First Amendment rights, that is, whether there is a sufficiently compelling interest or a sufficient interest of any kind on the part of the FBI which would justify it to carry out the activity with the effects which I have just described.

This brings up the question which has occupied us at great length, that is, whether indeed there is any indication that the upcoming meeting of the YSA will have any relation to violence, illegal activity of any kind.

We have had extensive proof and discussion on this point, which I will not attempt to describe in full detail now. I think it can be summarized as follows:

The YSA and the SWP are loyal to the teachings of Marx, Lenin and Trotsky. In 1938, the SWP subscribed or promulgated a declaration of principles which said, as quoted in the materials before me, that at all times the organizations would contend against the fatal illusion that the masses can accomplish their emancipation through the ballot box.

Although this does not specifically advocate violence and illegal activity, the Government urges with some reason that such is implicit in the statement. However, this is a declaration made some thirty-six years ago. The record is undisputed that the declaration was repudiated by the SWP in 1940. The Government contends that this was merely a subterfuge to avoid the application of certain legal strictures. The plaintiffs contend that the repudiation of violence or the amendment of the original declaration of principles was ut-

terly sincere, as proven by some thirty-four years at least, of a record of nonviolence.

In my view, the plaintiffs are completely right. I have asked the Government to come forward with any indication whatever of violent revolutionary activity or any other illegal activity carried out by the YSA or the SWP, and the Government has come forward with absolutely nothing.

I have asked the Government to provide any indication of any discussion of violence or illegal activity or any incitement of such activity involving any prior national convention of the YSA, this being the fourteenth such convention. The Government has come forward with nothing.

The Government's main reliance as far as any current problem or risk is concerned relates to a matter discussed at length this afternoon, which, again, I will not attempt to describe in detail. Basically, I believe, it can be summarized thus:

There have developed in the SWP throughout the world certain factions, one of which adheres to what they consider the traditional and standard SWP doctrine of nonviolence. This is admitted to be the clear majority view, at least in the United States. There is another, minority view, which apparently managed to have passed at a meeting this year, an international meeting, a resolution approving the use of guerrilla warfare in Latin America. The meeting to which I refer is called the Tenth World Congress and was held in early 1974.

The representative of the majority of the United States party was opposed to the resolution backing the use of guerrilla force in Latin America and said that in his opinion it foreshadowed a more basic

break, with more widespread geographical implications as far as the basic question of non-violence versus violence was concerned. However, the minority faction in the U.S. party, according to the representations made to me which I credit, which was in favor of the resolution about guerrilla warfare in Latin America, has been ousted from the SWP party in America as of July 1974.

There was never anything, in my view, beyond the most tenuous suggestion of a possible implication of violence in the United States.

In view of the ouster of the minority faction, I believe that tenuous suggestion has been basically eliminated.

It should be remembered that the SWP is a party with a membership of one thousand or two thousand and that in the last general election it obtained votes of about one hundred thousand.

The SWP and the YSA have come forward with materials which I find convincing regarding their current non-violent beliefs and their current disavowal of violence.

At the time of the assassination of President Kennedy, the national secretary of the SWP issued a press release condemning the assassination, condemning political terrorism and stating that political differences within our society must be settled in an orderly manner by majority decision after free and open public debate in which all points of view are heard.

The constitution of the SWP has nothing advocating violent, illegal activity. There is in the record a pamphlet written by one George Novack, entitled "Marxism versus Neo-Anarchistic Terrorism," which, despite what one may think of many of the beliefs

stated therein, is nevertheless a most eloquent and intelligent statement of reasons against what is called individual terrorist activity.

I have questioned, on the basis of that pamphlet, what ultimate form of activity is contemplated and advocated by the SWP and the YSA, and I think it can be summed up as follows:

There is, indeed, in the pamphlet I have referred to and in other pieces of literature much of the rhetoric of revolution, that is, use of the term "revolution". There is talk about action of the masses and so forth, and it is clear that the ultimate, long-range goal of the SWP would be and it is stated to be the expropriation of the financial resources of this country from their present owners and the placing of such resources in the hands of the working class.

Why is not this the advocacy of revolution which would justify FBI surveillance at the meetings of this group? I do not believe there is such justification, and I believe that the revolutionary rhetoric must be taken in context in order to avoid a departure from reality.

The talk about the expropriation of power is right now a discussion of theory. There is not the slightest indication of any mass action or any other action to now or in the near future expropriate property by this party. The party obviously realizes that its small size now would make such a program ridiculous. They have expressed this in their own words, and what they are doing right now is to have discussions of socialism. They are sponsoring and supporting causes which they believe in, such as the farm workers' activity in California, women's lib and so forth. The discussion

of ultimate action by the masses is a theoretical discussion.

I have reviewed a recent issue of their publication called The Militant, which is quite a lengthy newspaper, and it is filled with the discussion of all manner of public issues, and there is in my view not the slightest hint of any present violent threat or any such threat for the near future. The newspaper is filled with discussions of candidates supported by the SWP for various offices throughout the country, discussions of school board problems in New York City and so forth and so on.

As a matter of policy, it seems to me, finally, that the healthy thing for our society to do is to permit this group to freely have their discussions of the issues which concern them and of their theories. It seems to me inevitable that as a result of those discussions at such conventions as are coming up, the theories will evolve and that it would be absurd to place any restrictions upon their exercise of First Amendment rights because of some theoretical goal long in the future, if ever, of the consummation of their avowed socialist program.

For these reasons I find and conclude that the proposed FBI surveillance threatens a substantial impairment of the First Amendment rights of plaintiffs SWP and YSA and that the Government has shown no compelling interest and no other necessity of any other degree which would justify the impairment which I have described.

Since this is a preliminary injunction motion, the standard which I am to apply is an alternative standard, that is, a preliminary injunction is justified if the plaintiffs have shown a probability of success on

the ultimate merits and a threat of irreparable injury; or a preliminary injunction is justified if there are serious and substantial questions regarding the merits of the action, and the hardships to the plaintiffs from not granting the injunction outweigh the hardships to the defendants in granting the injunction. I think the second of the alternative tests is the appropriate one.

It surely seems to me clear that the plaintiffs have raised serious questions and substantial questions about their right to First Amendment relief. Further, it seems to me that there is a showing of substantial harm to the upcoming convention and to the participants if the injunctive relief is not granted.

Finally, it seems to me clear that the Government has shown nothing in the way of a loss to its interests if the injunction is granted.

The plaintiffs should settle an order at the earliest opportunity.

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